TRACTORS (M) BHD.

v.

JOSEPH THAMBIRAJAH & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C 800 of 1981]
2 SEPTEMBER 1985

CIVIL PROCEDURE: *Summary judgment - Appeal against decision of Senior Assistant Registrar under O. 14 - Delay in filing O. 14 application - Power of Court to enter summary judgment despite delay - Defence did not raise triable issue - Effect.*

The Senior Assistant Registrar dismissed the plaintiffs' application for summary judgment under O. 14. The plaintiffs appealed against this dismissal.

The 1st defendant did not dispute the existence of an agreement to hire an equipment from the plaintiffs but submitted that that there were triable issues in the case which would preclude an O. 14 judgment in that:

(i) there was a collateral agreement;

(ii) there were undue influence and misrepresentation.

The 1st defendant also raised the point that there was considerable delay in making the O. 14 application.

Held:

[1] No evidence of a collateral agreement was adduced.

[2] The Ist defendant had not disclosed any particulars of "undue influence" and "misrepresentation" apart from making a bare allegation in his defence and affidavit and had therefore not complied with O. 18 r. 12(1) of the Rules of the High Court 1980.

[3] There was considerable delay in making the O. 14 application and the plaintiffs had not provided an explanation for the delay. However, the Court has the power to enter summary judgment even though a defence had been filed and the plaintiff took some time to file the application.

[4] The 1st defendant had not raised any triable issue.

[Order to allow appeal confirmed.]

Cases referred to:
Tan Swee Hoe Co. Ltd v. Ali Hussain Bros. [1980] 2 MLJ 16
Societe Des Estains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267

Legislation referred to:
Contracts Act 1950, ss. 16, (1) 19, 20
Rules of the High Court 1980, O. 18 r. 12(1), O. 14

For the plaintiffs - K.S. Low; M/s. Che Mokhtar Mian Lee & Low
For the 1st defendant - C.S. Kumar; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Zakaria Yatim J:

This is an appeal against the decision of the Senior Assistant Registrar dismissing the plaintiffs' application for summary judgment under O. 14. The appeal was heard in Chambers on 25 September 1984. I allowed the appeal and ordered judgment for the plaintiffs in the sum of RM40,377.39 with costs and interest at the rate of 8% per annum from that date to the date of full realisation. On the application of the first defendant, the matter was adjourned into Open Court for further argument.

In their statement of claim, the plaintiffs averred, that by an agreement concluded between the plaintiffs and the first defendant on 9 March 1979, the plaintiffs agreed to let and the first defendant agreed to take on hire one unit used Caterpillar 950 Wheel Loader C/W GP Bucket Serial No. 73J2763 (the equipment). The plaintiffs' claim against the first defendant is for a total sum of RM40,377.39 being the outstanding balance of the rental and the costs of stamp fees, road tax as well as the costs of parts and services rendered.

In his statement of defence, the first defendant did not dispute that he concluded the said agreement with the plaintiffs on 9 March 1979 for the hire of the equipment. He also admitted that he was liable for rental of the equipment for the months of January 1979 to March 1979. According to the agreement, the hiring of the equipment was for a period of three months. During this period, the first defendant was to pay the plaintiffs punctually the monthly rental of RM4,500. On 12 October 1981, Messrs. P.C. Low & Co., the former solicitors of the first defendant wrote to the solicitors of the plaintiffs stating that their clients in three civil suits, including the present suit, would jointly pay the plaintiffs monthly a sum of RM4,000 instalments towards the settlement of the three cases. The first payment would commence on 1 November, 1981. The plaintiffs' solicitors accepted this mode of payment. The first defendant, however, failed to make any payment to the plaintiffs.

Mr. C.S. Kumar, Counsel for the first defendant submitted that there are triable issues in this case and the plaintiffs should not be allowed to enter judgment against the first defendant under O. 14.

Firstly, he said, there was a collateral agreement between the plaintiffs and the first and second defendants. According to him, the effect of this collateral agreement was to render a third party liable namely, Syarikat Bitumix Sdn. Bhd. It is true that, in law a collateral agreement can exist side by side with the main agreement which it contradicts. *Tan Swee Hoe Co. Ltd v. Ali Hussain Bros.* [1980] 2 MLJ 16 at 18. In the instant case, I have examined all the evidence contained in the affidavits and I find no evidence of a collateral agreement reached between the plaintiffs and the defendants.

Secondly, Mr. Kumar relied on a defence of undue influence and misrepresentation. He referred to the affidavit of the first defendant dated 19 October 1980, where the first defendant averred that he was "unduly influenced in entering into the said rental agreement by the Second defendant aforesaid and/or the servant or agent of the plaintiffs, one Mr. Julian Wong." Mr. Kumar then relied on ss. 16, 19 & 20 of the Contracts Act, 1950 (Revised - 1974). I find that in his statement of defence, the first defendant did not raise the question of "undue influence". Order 18 r. 12(1) of the Rules of the High Court expressly provides that,

> "every pleading must contain the necessary particulars of any claim, defence or other matters pleaded including ... particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies ...".

Even in his affidavit, he merely made a bare allegation of "undue influence" without giving the particulars. Mr. Kumar submitted that the first defendant had disclosed the particulars in paras. 3(a), (b) & (h) of the affidavit. That paragraph reads:

> 3. In reply to paras. 3 to 6 of the affidavit under reply, I state as follows:
>
> (a) in or about the month of January 1979 I was the Finance Director of a company known as Syarikat Bitumix Sdn. Bhd.
>
> (b) the Second defendant herein was at all material times the Chairman and Managing Director of the said Syarikat Bitumix Sdn. Bhd.
>
> ...
>
> (h) I state that I was merely influenced in entering into the said rental agreement by the Second defendant aforesaid and/or the servant or agent of the plaintiffs, one Mr. Julian Wong.

From the above paragraph, I find that the defendant had not disclosed any particulars of "undue influence" apart from making a bare allegation in sub-paragraph (h).

In my opinion, when a defendant relies on a defence of "undue influence" he should give particulars that when the agreement was concluded, the other party was in a position to dominate his will and uses that position to obtain an unfair advantage. Alternatively, he can give particulars that the other party holds a real or apparent authority over him or where he stands in a fiduciary relation to the other party. [See s. 16(1) of the Contracts Act]. None of these particulars were mentioned in the affidavit.

Similarly, no particulars were given in the affidavit on the question of misrepresentation. This question was not pleaded in the statement of defence of the first defendant nor was it mentioned in the affidavit. Indeed there was no evidence at all on misrepresentation.

Another point raised by Mr. Kumar was that the plaintiffs did not act promptly in filing the O. 14 application. According to him, there was considerable delay in making the application and the plaintiffs had not given any reasons for the delay.

I agree with him that there was considerable delay in the present case. The writ was filed by the plaintiffs on 1 July 1981. Appearance was entered by the first defendant on 24 May 1982. His statement of defence was filed on 15 June 1982. The application for summary judgment against him was filed on 25 May 1983, i.e. nearly two years after filing of the writ and almost one year after the defence of the first defendant was filed. In *Societe Des Estains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at 268, Abdoolcader J, as he then was, said,

> The writ in these proceedings was issued on 8 July 1977, and served on 29 July on the defendants who filed their defence and counterclaim on 12 August raising several points of defence and counterclaim, but the plaintiffs only took out their application for summary judgment for the full amount of their claim on 16 August. In *McLardy v. Stateum* the Divisional Court held that though it was intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but that in such an event the onus is cast on the plaintiff of showing why he did not apply sooner. The plaintiffs in this case have not discharged this onus and indeed Counsel appearing for them admitted this to be so.

Although there was a delay in that case and the plaintiff did not discharge the onus as to why he did not make the application for summary judgment sooner, the learned Judge, however, gave judgment for the plaintiff. In the light of the decision in the *Societe's* case, the Court has the power to enter summary judgment against the first defendant even though a defence had been filed and the plaintiff took some time to file the O. 14 application.

In the circumstances, I find that the first defendant has not raised any triable issue in the instant case. I, therefore, confirm the Order I made in Chambers on 25 September 1984. The first defendant will pay the costs of further argument in Open Court to the plaintiffs.

Also found at [1986] 2 CLJ 72